Supreme Court, U.S.
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No. 00-730

In The

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

RODNEY SLATER, Secretary of the United States Department of Transportation, KENNETH WYKLE, Administrator of the Federal Highway Administration, VINCENT F. SCHIMMOLLER, Administrator of Region VIII, Federal Highway Administration, and LARRY C. SMITH, Engineer of the Central Federal Lands Highway Division,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY

I. Certiorari Should Be Granted Because The Panel's Decision Is Not A Mere Misapplication Of Law; It Is A Gross Distortion Of Strict Scrutiny That Directly Conflicts With The Instructions Of This Court And Decisions By Other Circuits.

Respondents make much of the panel's correct statement of the elements of strict scrutiny, as though mere recitation of criteria were a talisman. Resp. at 14. The empty explication of the elements of a test, however, does not weigh against *certiorari*, as is evident from this Court's most recent decision in this very case. Pet. App. at 111. Instead, because the panel's decision is a wholesale perversion of strict scrutiny, correction by this Court is all but mandated.

Strict scrutiny requires strong evidence of past discrimination to support a compelling interest in remediating the effects of that discrimination. Pet. App. at 224 (majority opinion); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (majority opinion); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion). Thus, when the asserted compelling interest is remediation of past prejudice, as it is in this case, "the true test of an affirmative action program is . . . the adequacy of the evidence of discrimination offered to show that interest."[1]

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[1] The asserted interest, however, must be a permissible one. Despite Respondents' contrary assertion, Resp. at 23, Congress' impassioned but impermissible goal here was racial proportionality, as is evident in the following exemplary statements. The DBE program is "a necessary means in trying to achieve true multi-cultural and multi-gender diversity amongst those people this government chooses to do business with." 144 Cong. Rec. H-2006 (daily ed. April 1, 1998) (statement by Rep. Jackson-Lee). "We all contribute to that [general commerce] pot every year. So when it comes time to cut it up, we should all get a piece. . . . [w]omen and minorities [in]cluded." *Ibid.* at H-2007 (statement by Rep. Brown).

Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895, 906 (11th Cir. 1997). To apply the test, therefore, a reviewing court must make an independent assessment of the proffered evidence. *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1564-65 (11th Cir. 1994) (and cases marshaled there).

Abandoning this established law, the panel effectively substituted an entirely new test.[2] That is, instead of independently assessing the evidence in any meaningful way, the panel accepted a series of conclusory statements as truth and then blessed the challenged statutes. If allowed to go uncorrected, the panel's severe distortion of strict scrutiny ultimately would destroy that crucial standard.[3] Further, the panel's refusal to apply established law puts the panel in direct conflict with this Court and other circuits.

One obvious example of the panel's mutation of the test is its failure to consider whether the statistical analyses it quoted for their results contained regression analyses

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[2] Insofar as it resembles the more lenient standard of *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the panel's mutated test is not new; it is old and overruled. In this very case, this Court expressly held that "to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling." Pet. App. at 241. For the same reason, Respondents' assertion that the panel was correct to apply a more lenient test to Congress, Resp. at 14-15, cannot be entertained.

[3] If there is to be any change in the strict scrutiny test, then the change should be the one Justice Scalia has urged on more than one occasion, not the one a majority of this Court so recently overruled. *See infra*, n.2. Under Justice Scalia's test, evidence of discrimination against some "creditor" race in the past could never justify deliberate, legally mandated discrimination against some other "debtor" race in the present. Pet. App. at 245 (Scalia, J., concurring). Applying this test, "[i]t is unlikely, if not impossible, that the challenged program would survive. . . . " *Id.*

that accounted for the right variables. Pet. App. at 35-38. Such probing is irrefutably mandatory because "the requirement of considering various salient causal factors is part and parcel of [the government's] duty to limn a plausible causal relationship between particular independent and dependent variables." *Wessmann v. Gittens*, 160 F.3d 790, 834 n.8 (1st Cir. 1998) (internal citations omitted). In fact, "the Supreme Court unanimously held . . . that a regression analysis that does not control for at least major variables may be altogether inadmissible." *Smith v. Virginia Commonwealth University*, 84 F.3d 672, 681 (4th Cir. 1996), *citing Bazemore v. Friday*, 478 U.S. 385, 400 & n.10 (1986).

In particular, the panel's conclusion that the submitted evidence of racial prejudice regarding access to capital was "particularly striking," Resp. at 21, clearly demonstrates the panel's gutting of strict scrutiny. In thirteen citations of "evidence" that race discrimination caused disparate access to capital, the court noted whether "all other factors were equal" in only three.[4] Pet. App. at 37-38 (Grown & Bates report, Ando article, CCCD survey). As to those three, moreover, the panel made no effort whatsoever to ensure that the "experts" had actually considered even some of the major contributory factors, let alone all of them. *Id.* Had the panel not departed from the holdings of other circuits, the panel would have been forced to examine the data and methods behind those "expert" statements because, as the Seventh Circuit observed, "an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."

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[4] The other ten bits of "evidence" on which the panel relied consisted solely of parroting conclusory statements made before Congress. Pet. App. at 35-38. Giving credence to this "evidence" contravenes this Court's admonition in *Croson* that "highly conclusionary statement[s] of proponent[s] of the Plan that there was racial discrimination in the construction industry . . . are of little probative value in establishing identified discrimination . . . . " 488 U.S. 469, 500.

Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333, 1339 (1989).

The panel's dependence on local studies such as Brimmer & Marshall's in Atlanta (Pet. App. at 43, on which Respondents rely heavily, Resp. at 22) further exposes the panel's evisceration of strict scrutiny. Long before the panel, and then Respondents, cited it as "particularly striking" evidence of deliberate discrimination, that study had been thoroughly discredited. Suffering as it does from two "insurmountable" flaws, "the Brimmer-Marshall Study fails to provide a strong basis in evidence of discrimination against [D]BEs to justify [a] racial and ethnic preference program."[5] *Webster v. Fulton County*, 51 F.Supp.2d 1354, 1357, 1368-70 (N.D. Ga. 1999), *aff'd*, 218 F.3d 1267, 1267 (11th Cir. July 19, 2000). By its refusal to do what this Court and other circuits have mandated, the panel has not just "erroneously applied the law to the facts"; it has obliterated the law altogether, necessitating this Court's supervisory review.[6]

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[5] First, the "study proceeds on the premise that a statistical showing of underutilization of minorities in the marketplace as a whole is sufficient proof of discrimination to justify a program of racial preferences by a local government in whatever area is involved." Second, the report contained "no statistical analysis of other factors that may affect minority business enterprise availability and utilization." *Id*. The same flaws pervade the putative "strong evidence of compelling interest" in this case, despite Respondents' contention that Congress need not make local findings before imposing race-based classifications in that locale. Resp. at 19-20.

[6] These observations call for *certiorari* despite Respondents' various contentions that: the panel's decision does not conflict with the law of other circuits, Resp. at 13; that the panel did not address whether the "strong evidence" requirement applies to Congress, Resp. at 14-15; that the panel is the first court to have construed the revised regulations and other courts are now in the processes of doing so, Resp. at 16; or that Adarand "mostly ignores the numerous ways" in which Respondents believe the

Even if this case were an instance of mere misapplication of evidentiary standards or constitutional tests, Resp. at 14, *certiorari* should still be granted because this case is directly analagous to cases in which this Court granted *certiorari* for the express purpose of reviewing such misapplications. *E.g., United States Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 453 (1986) (Court "granted certiorari in order to consider the [petitioner's] claim that . . . the Court of Appeals . . . grossly misapplied the substantial evidence test"); *Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 147 (1981) ("Because we conclude that the court below misapplied the prevailing standard for finding a waiver of the State's immunity under the Eleventh Amendment, we grant a writ of certiorari and reverse"). Furthermore, in this very case, this Court granted *certiorari* to review application of the mootness standard by this same panel and reversed without benefit of briefs on the merits or argument.[7] Pet. App. at 1113.

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program to be narrowly tailored, Resp. at 24. These contentions are all fallacious because, as described above, the strict scrutiny requirement of looking behind conclusory statements is unavoidable, irrespective of the text of the challenged statute or regulation. Further, this Court wrote in this very case, "we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny," that is, in the same way. Pet. App. at 231.

[7] This Court's most recent decision in this case also answers Respondents' assertion that the Comptroller General's need to review the DBE program this year counsels against *certiorari*. Resp. at 17. Even if the Comptroller were to abolish the program, which seems highly unlikely given its history, that would merely render the program "capable of repetition yet evading review," Respondents' regulatory gymnastics notwithstanding. Pet. App. at 108.

II. Certiorari Should Be Granted Because There Is No Barrier To Adarand's Challenge Of The Validity Or Applicability Of The New TEA-21 Regulations.

Respondents, like the panel below, contend that the new TEA-21 regulations rescue the challenged statutes from constitutional infirmity. *E.g.*, Resp. at 7. Respondents also contend, alternatively, that it is too late for Adarand to challenge the applicability or validity of the regulations, or that Adarand lacks standing to do so. Resp. at 28. Those contentions fail because the race-based presumptions of disadvantage are required by federal statute; the new regulations impermissibly nullify them; and there is no barrier to Adarand's assertion of these arguments.

Despite Respondents' remarkable insinuation to the contrary, Resp. at 28, the presumption that members of certain racial and ethnic minorities are disadvantaged is, in fact, "mandatory" under the challenged federal statutes. *E.g.*, Pet. App. at 307 (SBA § 8(d): " . . . *shall presume* that . . . disadvantaged individuals include" specified minorities). Further, the meaning of the phrase "shall presume" in this statutory context is perfectly clear. "A presumption is an assumption of fact resulting from a rule of law which *requires* such fact to be assumed from another fact or group of facts found or otherwise established. . . . " Uniform Rules of Evidence, Rule 13, *quoted in* 9 *Wigmore on Evidence* § 2493f (1981) (citing A.L.I. Model Code of Evidence Rule 701(1,2)) (emphasis added). Thus, "if a basic fact ([race]) is established, the factfinder *must accept* that the presumed fact ([disadvantage]) has also been established, unless the presumption is rebutted." 1 Weinstein's Federal Evidence § 301.02[1] (2nd Ed. 2000) (emphasis added); *accord*, 9 *Wigmore on Evidence* § 2491 (1981); 2 *McCormick on Evidence* § 346 (5th Ed. 1999). Accordingly, one cannot simultaneously maintain a presumption while demanding actual evidence of the presumed fact. The presumption of delivery of properly posted mail, for example, affirmatively precludes any demand that the mailing party produce evidence that a letter actually reached its addressee unless and until some other party shows evidence

that the letter did not arrive. *See McCormick*, § 343 at 439. It is therefore nonsense to assert, as Respondents do, that the government presumes an Hispanic woman is disadvantaged while simultaneously demanding that she prove it.[8]

Because the new regulations lead to such a nonsensical result, they are void. US-DOT may not nullify this clear statutory mandate by contrary regulation. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989). ("[N]o deference is due to agency interpretations at odds with the plain language of the statute itself[; e]ven contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.") "A regulation which does not carry into effect the will of Congress as expressed by the statute, but operates to create a rule out of harmony with the statute, is a mere nullity." *Guardians Ass'n v. Civil Service Com'n of City of New York*, 463 U.S. 582, 614 n.2 (1983) (internal brackets omitted), *quoting Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

The invalidity of the new regulations is quite apparent from a comparison between Respondents' own argument and this Court's most recent opinion in this case. The last time this Court saw this case, Colorado had attempted to promulgate regulations fundamentally identical to the self-certification scheme newly set forth in 49 C.F.R. Part 26. Both

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[8] Attempting to escape this conundrum, Respondents assert that "the presumption continues to operate" because a sworn statement of social disadvantage, somehow, is not "actual proof." Resp. at 28. An affidavit or sworn certification is certainly evidence. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts"); Fed. R. Civ. Pro. 56(e). Therefore, since the basic fact of race is already established, the requirement for a further attestation of disadvantage—under penalty of prosecution for fraud—is certainly a requirement for evidence in contravention of the presumption, which obviously does not "continue to operate."

this Court and US-DOT itself, however, pronounced Colorado's self-certification scheme illegal. First, this Court described the commandments of TEA-21 and SBA § 8(d), emphatically noting the statutory requirement that "the certifying entity *presume* [certain racial minorities] to be socially disadvantaged. . . . " Pet. App. at 104 (emphasis in original). Then, this Court observed that "Colorado . . . did away with the presumption of social disadvantage . . . and in its place substituted a requirement that all applicants certify on their own account that each of the firm's majority owners has experienced social disadvantage. . . . " *Id.* at 106. Accordingly, in a *per curiam* opinion this Court unanimously decried the "patent incompatibility" of such self-certification schemes with the federal law—the same law challenged here. Pet. App. at 110. Now this time, both Respondents and the panel below describe the new TEA-21 regulations in terms indistinguishable from this Court's description of Colorado's failed plan: "[US-]DOT currently requires *all* individuals claiming to be disadvantaged to certify . . . that they in fact are socially and economically disadvantaged. . . . " Resp. at 3 (emphasis in original). This comparison reveals that US-DOT's new regulations are void and therefore provide no safe haven from constitutional challenge of the underlying statutes.

Stunningly, Respondents ignore that they themselves have concluded that the presumptions are mandatory and that, consequently, self-certification schemes are illegal. Rejecting Colorado DOT's proposed self-certification scheme, US-DOT plainly stated in a letter to Colorado DOT:

> Not only the [US-DOT]'s regulation, but also the statutes that mandate it, require the use of a presumption of social and economic disadvantage. . . . [US-DOT] does not have the authority to permit a recipient of its funds to ignore a statutory requirement. . . . [I]n its most recent decision in the *Adarand* litigation, the Supreme Court specifically noted the conflict between these requirements and the CDOT program . . . The proper use of the presumption of disadvantage is fundamental . . . .

Reply App. at 2-3. Respondents cannot now be allowed to reverse their view on this subject in an attempt to avoid this Court's review.

Respondents' attempt to escape their own conclusion by asserting that Adarand has not challenged the regulations before now, and that therefore the argument is barred. Resp. at 28. That assertion is without merit because the test for whether this Court should consider an argument is whether the issue in question formed any part of "the basis for the decision below." *Matsushita Elect. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1979). In this case, the new regulations formed the very foundation of the panel's decision below. *E.g.*, Pet. App. at 59. As a result, arguments regarding the validity and applicability of those regulations are properly before this Court.

Respondents' half-hearted feint at a standing challenge also fails, because the regulations have not changed in any way relevant to standing analysis. Simply reiterating the statutory requirements, the new regulations still purport to determine eligibility for preferences in contracting and still require Adarand—regardless of whether anyone challenges its certification—to prove a number of specific facts about its owner.[9] No such requirements apply to members of certain minority groups. 49 C.F.R. § 26.67 and Appendix E (2000). An a result, Adarand continues to have standing to challenge these regulations because this Court held unequivocally that this imbalance in certification requirements results in Adarand's inability to compete on an equal footing. Pet. App. at 201-212. Coupled with the established likelihood that Adarand will continue to bid against certified DBEs, this Court held, unequal footing is all that is required for standing. *Id.*

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[9] Pursuant to TEA-21 §§ 1101(b)(2)(B) and (b)(4), repeated in 49 C.F.R. § 26.67(d) and Appendix E, Adarand would have "the burden of demonstrating . . . , by a preponderance of the evidence, that [it is] socially and economically disadvantaged," which would require Adarand to submit proof of a detailed series of specified facts and circumstances. *Id.*

Adarand's standing is therefore the law of the case and cannot now be denied in order to save Respondents from further and final review by this Court.

III. Disuse Of The SCC Is Irrelevant To Whether Certiorari Should Be Granted Because Adarand Also Challenges The Statutory Scheme That Gave Rise To The SCC.

Respondents assert, yet again, that this case is limited to a challenge of the subcontractor compensation clause that is no longer part of US-DOT's regulatory scheme. Resp. at 4. As it has been from the start, that assertion is factually inaccurate and legally impermissible. Adarand's first Complaint and its Amended Complaint both sought "a judgment that [the challenged highway funding statutes], the regulations promulgated thereunder *and* the contract provisions" are unconstitutional. Reply App. at 5, 8 (emphasis added). The challenged statutes included SBA § 8(d), which now comprises the operative core of TEA-21's DBE provisions. Reply App. at 8; Pet. App. at 300, 307. Guided by this Court's instructions on remand, the District Court below correctly recognized that Adarand had challenged the statutes. Pet. App. at 160-61.

CONCLUSION

For these reasons, *certiorari* should be granted.

Respectfully submitted,

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[SEAL]

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

March 28, 20000

Mr. Thomas F. Norton
Executive Director
Colorado Department of Transportation
EO Center
4201 East Arkansas Avenue
Denver, CO 80222

Dear Mr. Norton:

I am writing to respond to the program waiver proposals made by the Colorado Department of Transportation (CDOT) in its submission of a disadvantaged business enterprise (DBE) program to the U.S. Department of Transportation. The Department's DBE regulation (49 CFR part 26, at §26.15(b)) authorizes the Secretary of Transportation to grant program waivers under specified conditions.

[Redacted]

CDOT's second waiver proposal would absolve CDOT from implementing §26.67(d) with respect to individual determinations of social and economic disadvantage. This paragraph of the rule provides that firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (e.g., white males) may apply for DBE certification. Recipients are to make a case-by-case determination of whether such individuals are socially and economically disadvantaged. The applicant has the burden of proof as to his social and economic disadvantage.

Portions of CDOT's DBE program submission appear consistent with this regulatory requirement. The certification application form in Attachment B to the DBE program provides that, unlike applicants who are presumed to be disadvantaged, other applicants must submit an affidavit demonstrating the basis of their claim of disadvantage. Other language in the program, however, suggests that CDOT intends not to require an individual showing of disadvantage by individuals who are not presumed to be disadvantaged. The effect of this language, as well as that of the waiver request, is to extend the presumption of disadvantage to all applicants.

Not only the Department's regulation, but also the statutes that mandate it, require the use of a presumption of social and economic disadvantage and specifically limit the applicability of that presumption to certain designated groups. The Department does not have the authority to permit a recipient of its funds to ignore a statutory requirement. I would note that in its most recent decision in the *Adarand* litigation, the Supreme Court specifically noted the conflict between these requirements and the CDOT program (*Adarand Constructors, Inc. v. Rodney Slater, Secretary of Transportation, et al.*, 2000 U.S. Lexis 505, at p. 4.).

As specifically provided in the first sentence of §26.15(b), recipients may apply for a program waiver "of any provision of Subpart B or C of this part . . . " Section 26.67(d) is found in Subpart D, and it is consequently outside the portion of the DBE regulations from which program waivers may be granted. Even if, procedurally, the Department could consider a waiver request on this subject, or even if the request were styled as a request for an

exemption rather than for a waiver, the Department could not grant it. The proper use of the presumption of disadvantage is fundamental to the implementation of the statutes upon which the DBE regulation is based. For these reasons, your second waiver request is denied, and CDOT must implement its DBE program consistently with the Department's regulations.

I look forward to continuing the partnership between the Department and CDOT as we implement the DBE program. If you have any questions, please feel free to contact me or the Department's General Counsel, Ms. Nancy McFadden, at 202-366-4702.

Sincerely,

/s/ Rodney E. Slater
Rodney E. Slater

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. **90-1413**

ADARAND CONSTRUCTORS, INC. a Colorado Corporation,

Plaintiff,

(Filed Aug. 10, 1990)

v.

SAMUEL K. SKINNER, Secretary of the Department of Transportation, ROBERT E. FARRIS, Administrator of the Federal Highway Administration, LOUIS N. MACDONALD, Administrator of Region VIII of the Federal Highway Administration, and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Defendants.

COMPLAINT AND JURY DEMAND

COMES NOW Plaintiff, ADARAND CONSTRUCTORS, INC., by and through its attorneys, Mountain States Legal Foundation, and for its complaint against Defendants, alleges as follows:

[Redacted]

23. As a direct result of STAA, STURAA, the regulations promulgated thereunder, and the contract provisions established as a result of STAA, STURAA, and the regulations, as enforced by the defendants, Plaintiff has been denied the award of specialty subcontract work on account of the gender, race, sex or national origin of its operator. If STAA, STURAA, the regulations and contract provisions were declared unconstitutional, Plaintiff could bid for and receive contracts free from discrimination on account of gender, race, sex or national origin.

[Redacted]

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Honorable Court grant the following relief:

1. Entry of a judgment declaring that § 105(f) of STAA, § 106(c) of STURAA, the regulations promulgated thereunder and the contract provisions promulgated pursuant to STAA, STURAA and the regulations are facially unconstitutional;

2. Entry of judgment declaring that § 105(f) of STAA, § 106(c) of STURAA, the regulations promulgated thereunder and the contract provisions promulgated pursuant to STAA, STURAA and the regulations, are unconstitutional as they are applied and thus deprive Plaintiff of rights secured by the Constitution and Laws of the United States;

3. Entry of judgment declaring that the Federal highway program administered by the Central Federal

Lands Highway Division violates the rights of Plaintiff under the Constitution of the United States;

4. Entry of Judgment permanently enjoining Defendants from discriminating in the future on the basis of gender, race, sex or national origin in the administration of federal highway contracts;

5. Entry of Judgment awarding costs and attorneys fees to Plaintiff pursuant to 42 U.S.C. § 1983; and

6. For such other and further relief as to the Court seems just and equitable in the premises.

[Redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-K-1413

ADARAND CONSTRUCTORS, INC. a Colorado Corporation,

Plaintiff,

v.

FEDERICO PEÑA, Secretary of the Department of Transportation, RODNEY E. SLATER, Administrator of the Federal Highway Administration VINCENT F. SCHIMMOLLER, Administrator of Region VII of the Federal Highway Administration, and LARRY C. SMITH, Division Engineer of the Central Federal Lands Highway Division,

Defendants.

(Filed Jan, 22, 96)

FIRST AMENDED COMPLAINT

COMES NOW Plaintiff, ADARAND CONSTRUCTORS, INC., by and through its attorneys, Mountain States Legal Foundation, and for its first amended complaint against Defendants, alleges as follows:

[Redacted]

31. As a direct result of STAA, STURAA, ISTEA, § 8(d) of the SBA and 15 U.S.C. § 644(g) and the regulations promulgated thereunder, and the contract provisions established as a result of STAA, STURAA, ISTEA, § 8(d) of the SBA and 15 U.S.C. § 644(g) and the regulations, as enforced by the defendants, Adarand has been denied the award of specialty subcontract work on account of the race or national origin of its operator. If STAA, STURAA, ISTEA, § 8(d) of the SBA, 15 U.S.C. § 644(g), the regulations, and contract provisions were declared unconstitutional, Adarand could bid for and receive contracts free from discrimination on account of race or national origin.

[Redacted]

PRAYER FOR RELIEF

WHEREFORE, Adarand respectfully requests that this Honorable Court grant the following relief:

1. Entry of a judgment declaring that § 105(f) of STAA, § 106(c) of STURAA, § 1003(b) of ISTEA, § 8(d) of the SBA (15 U.S.C. § 637(d) and 15 U.S.C. § 644(g) and the regulations promulgated thereunder and the contract provisions promulgated pursuant to those statutes and the regulations are unconstitutional as applied to highway construction in the State of Colorado and thus deprive Adarand of rights secured by the Constitution and Laws of the United States;

2. Entry of judgment declaring that the Federal highway program administered by the CFLHD in the State of Colorado violates the rights of Adarand under the Constitution of the United States;

3. Entry of Judgment permanently enjoining Defendants from discriminating in the future on the basis of race or national origin in the administration of federal highway contracts in the State of Colorado;

4. Entry of Judgment awarding costs and attorneys fees to Adarand; and

5. For such other and further relief as to the Court seems just and equitable in the premises.

DATED this 22nd day of January, 1996.

[Redacted]